

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,)	
)	No. 56298-3-I
Respondent,)	
)	DIVISION ONE
v.)	
)	UNPUBLISHED OPINION
BOBBY D. COLBERT,)	
)	
Appellant.)	FILED: July 24, 2006

PER CURIAM. -- A jury found Bobby Colbert guilty of one count of rape in the third degree and one count of rape in the second degree. The two counts involved different victims and events that occurred on different dates. Colbert appeals, arguing that the trial court abused its discretion in denying his motion to sever the counts for trial. Finding no error, we affirm.

FACTS

Bobby Colbert was charged with three sex offenses. Count one was rape in the third degree by lack of consent on November 29, 2004, where the victim was B.J. Count two was rape in the second degree by forcible compulsion on March 18, 2004, where the victim was K.P. Count three was indecent liberties against a physically helpless individual on June 26, 2004.

Following a hearing on Colbert's motion to sever the counts for trial, the trial court ordered that the charge of Indecent Liberties be severed from the other two counts.

At Colbert's trial on the rape charges, the State first put forth its evidence regarding B.J. She testified that she first met Colbert at a shopping mall on November 28, 2003. She saw Colbert again at the mall the next day. B.J. was with a female friend and Colbert was with a male friend. The four of them left the mall together in Colbert's friend's car and parked in an isolated area. Colbert and B.J. sat in the back seat of the car while the other two went for a walk. Colbert began to kiss B.J. and she pushed him away. Colbert pulled B.J.'s pants off and she pushed him away and told him to stop. Colbert then took his own pants down, got on top of her so that she could not move, and put his penis in her vagina. B.J. testified that she told Colbert "no" more than 10 times during the incident.

B.J. testified that she told an acquaintance about the incident that night. A few days later, B.J. told her mother about the incident and reported it to the police.

After B.J.'s testimony, the defense renewed the motion to sever and the trial court denied the motion.

K.P. then testified as follows. She said that she met Colbert through her boyfriend. She described an incident in early March, 2004, when she and Colbert were alone in her house and Colbert exposed himself to her and asked her for sex. K.P. refused, and Colbert left when she asked him to.

K.P. further testified that on March 18, 2004, she was alone with Colbert

at his apartment and he began to kiss her. She told him “no,” and did not kiss him back. K.P. said that she tried to push Colbert away but he over-powered her. Colbert then unfastened K.P.’s pants despite her efforts to stop him. When she tried to pull her pants back on, Colbert put his arm in the small of her back, bent her over at the waist, and put his penis in her vagina.

K.P. then went to a friend's apartment and told her what happened. K.P. reported the incident to the police the next day.

After the State rested, Colbert renewed the motion to sever. The trial denied the motion, ruling in pertinent part,

Here we have, at least in my view, at this point, pretty strong testimony by both of the complaining witnesses that is detailed and fairly compelling. Obviously we haven't heard the defense's case yet. But at this point I have to say that the State's case on both cases is pretty strong. I can't say one is particularly weaker than the other. ...

The second factor is clarity of the defenses that we're going to propose. ... He testified to both, that in each case the women consented. I don't see there's any embarrassment to him having these cases joined. It doesn't interfere with his defense at all.

...
The next thing that needs to be considered is whether the jury is able to compartmentalize the evidence in such a way that they can reasonably be expected to make a separate decision on each count. What do we have here? We have different victims with different names. Acts occurred under different locations. One is a car. One is an apartment. I think it's pretty clear they can keep that straight. They even happened in different years. I don't think they are going to have any trouble at all compartmentalizing these two cases, keeping them straight. ...

The next factor one has to consider is very important, in judicial economy. ... Under the circumstances I don't think that examination of all of these factors militates towards the separation of these two cases. I don't think they have to be severed.¹

Colbert testified that both B.J. and K.P. initiated sex with him and that his sexual intercourse with both women was consensual.

On February 8, 2005, the jury returned verdicts of guilty to both rape charges. Colbert appeals.

DISCUSSION

Colbert argues that his convictions should be reversed and the charges remanded for separate trials on the ground that the trial court abused its discretion in denying the motions to sever.

CrR 4.3(a) permits two or more offenses of similar character to be joined in one trial. Offenses properly joined under CrR 4.3(a), however, may be severed if "the court determines that severance will promote a fair determination of the defendant's guilt or innocence of each offense." CrR 4.4(b). We review the denial of a motion to sever for abuse of discretion. State v. Watkins, 53 Wn. App. 264, 269, 766 P.2d 484 (1989). Discretion is abused if it is exercised on untenable grounds or for untenable reasons. State v. Thang, 145 Wn.2d 630, 642, 41 P.3d 1159 (2002).

In assessing whether severance is appropriate, a trial court weighs the prejudice inherent in joined trials against the State's interest in maximizing judicial economy. State v. Kalakosky, 121 Wn.2d 525, 537, 852 P.2d 1064 (1993). Factors the trial court considers when assessing prejudice include (1)

¹ Verbatim Report of Proceedings (Feb. 3, 2005) at 107-09.

the strength of the prosecution's evidence with respect to each charge, (2) the jury's ability to keep the evidence separate, (3) the court's instructions to the jury to consider the evidence separately, and (4) the cross-admissibility of the offenses had they not been tried together. Kalakosky, 121 Wn.2d at 537.

A review of these factors demonstrates that the trial court's decision to join the two rape counts for trial was a proper exercise of its discretion.

First, the evidence on each count was uniformly strong. In each instance, the victims gave detailed accounts of the events, there were no eye-witnesses, and the jury was asked to weigh the witnesses' credibility. Consideration of this factor supports joinder.

Second, the two charged incidents were separate and distinct. Each count involved a distinct victim, location and date of occurrence. Thus, there was no evidence that overlapped from one count to the other. Where the evidence with respect to each charge is separate and distinct, it is easier for the jury to evaluate the pertinent evidence without regard to the other charges. State v. Harris, 36 Wn. App. 746, 751, 677 P.2d 202 (1984). Consideration of this factor similarly favors joinder of the two counts for trial.

Third, the counts were completely distinct and uncomplicated and therefore unlikely to lead to juror confusion. The trial court properly instructed the jury as to the elements of each count and to consider the evidence for each count separately. When a joined trial involves distinct, uncomplicated counts, it

is assumed that a jury instructed to decide each count separately can do so.

State v. Bythrow, 114 Wn.2d 713, 723, 790 P.2d 154 (1990). Consideration of this factor favors joinder of the two counts for trial.

Fourth, the trial court considered whether the evidence was cross-admissible and found that it was not. Although this factor weighs in favor of severance, this factor alone does not warrant reversal of an order denying severance where separate crimes are not difficult to "compartmentalize," the State's evidence on each count is strong, and the trial court instructed the jury to consider each count separately. Kalakosky, 121 Wn.2d at 539. The record shows that the trial court properly considered this issue in relation to the other factors.²

Finally, the benefit to judicial economy outweighed any prejudice suffered by Colbert. The court did not abuse its discretion by so finding and refusing to sever the counts for trial.

In summary, Colbert fails to show that the trial court's ruling on the motion

² Colbert relies on State v. Hernandez, 58 Wn. App. 793, 794 P.2d 1327 (1990), and State v. Ramirez, 46 Wn. App. 223, 730 P.2d 98 (1986), to argue that he was unduly prejudiced and the trial court abused its discretion in denying his motion to sever because the evidence on the separate counts was not cross-admissible. We disagree, as both Hernandez and Ramirez are distinguishable. In Hernandez, the defendant was tried on three counts of robbery of different convenience stores occurring on different days and there was great disparity between the witnesses' certainty in identifying the defendant. This difference in the strength of evidence, coupled with the lack of cross-admissibility, required severance. Hernandez, 58 Wn. App. at 800. In Ramirez the defendant faced two counts of indecent liberties with two minor victims, and the State sought to admit each offense against the other to show intent and absence of mistake or accident. Ramirez, 46 Wn. App. at 227. Severance was required because the two offenses were not admissible against each other and the State argued that the evidence of one offense made it more likely that the other offense occurred. Ramirez, 46 Wn. App. at 228. No such argument was made at Colbert's trial.

was manifestly unreasonable or that the trial court exercised its discretion on untenable grounds or for untenable reasons.

Colbert also contends that the evidence of forcible compulsion was insufficient to support his conviction for second degree rape. We disagree.

The second degree rape statute under which Colbert was convicted provides that "[a] person is guilty of rape in the second degree when, under circumstances not constituting rape in the first degree, the person engages in sexual intercourse with another person ... [b]y forcible compulsion." RCW 9A.44.050(1)(a). Forcible compulsion is "physical force which overcomes resistance" RCW 9A.44.010(6).

Whether a rape victim communicated her lack of consent is a question of fact based on the totality of the circumstances. State v. McKnight, 54 Wn. App. 521, 526, 774 P.2d 532 (1989) (citing 65 Am. Jur. 2d Rape § 6, at 765 (1972)). A rape victim's resistance need not be physical. McKnight, 54 Wn. App. at 525. It can be manifested by "any clear communication of the victim's lack of consent." Id. (quoting State v. Reed, 166 W. Va. 558, 562, 276 S.E.2d 313 (1981)). The force referred to in forcible compulsion simply means the exertion of physical power. Id. at 527. The kind of force is immaterial; it could be taking indecent liberties or grabbing and kissing a person against her will. Id.

Evidence is sufficient to support a conviction if, viewed in the light most favorable to the prosecution, any rational trier of fact could have found the

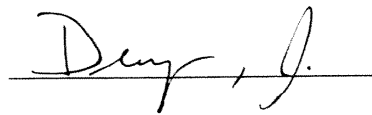
essential elements of the crime beyond a reasonable doubt. State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980). In assessing the sufficiency of the evidence supporting a conviction, the State's evidence is presumed to be true, and this court considers all reasonable inferences that can be drawn from that evidence. State v. Gear, 30 Wn. App. 307, 310, 633 P.2d 930 (1981).

We find that there is substantial evidence upon which a rational trier of fact could conclude that K.P. resisted Colbert's efforts attempt to have sexual intercourse with her. She testified that she repeatedly told him no, she tried unsuccessfully to push him away, she repeatedly tried to put her pants back on after he took them off, and he pushed her over with his arm on her back. A reasonable fact finder could conclude from this that Colbert used physical force to overcome K.P.'s resistance.

Finally, because the prosecutor properly stated the law regarding forcible compulsion in her closing argument, we reject Colbert's prosecutorial misconduct claim.

Affirmed.

FOR THE COURT:

A handwritten signature in cursive script, appearing to read "Dwyer, J.", written over a horizontal line.A handwritten signature in cursive script, appearing to read "Baker, J.", written over a horizontal line.

No. 56298-3-1/9

Becker, J.